STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA M. LINDSEY,

Plaintiff-Appellant,

v

ST. JOHN HEALTH SYSTEM, INC., ST. JOHN HEALTH SYSTEM–DETROIT MACOMB CAMPUS, ST. JOHN HOSPITAL & MEDICAL CENTER, ST. JOHN HOSPITAL and ST. JOHN RIVERVIEW HOSPITAL, d/b/a DETROIT RIVERVIEW,

Defendants-Appellees,

and

JANE DOE,

Defendant.

UNPUBLISHED
March 22, 2005

No. 251898
Wayne Circuit Court
LC No. 03-314865-NO

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting defendants' motion for summary disposition. The circuit court concluded that plaintiff's complaint alleged medical malpractice and, therefore, was procedurally deficient and also barred by the two-year statute of limitations governing malpractice actions, MCL 600.5805(6).[1] We affirm in part and reverse in part.

This action arises from plaintiff's hospitalization at St. John Riverview Hospital from May 10 through May 14, 2000. Plaintiff commenced this action on May 8, 2003, alleging that

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[1] This statute was amended by 2002 PA 715, effective March 31, 2003. Before the amendment, subsection (6) was codified as subsection (5).

she was treated rudely and unprofessionally by hospital nursing staff during her hospitalization. Plaintiff further alleged that a nurse injected an unknown substance into her IV, causing her to become ill, and that hospital staff thereafter failed to respond to her calls for assistance, causing her injury. Plaintiff's complaint included counts for (1) intentional infliction of emotional distress, (2) ordinary negligence, (3) gross negligence, (4) negligent entrustment, (5) proprietary function, and (6) breach of warranties. Defendants moved for summary disposition on the ground that, substantively, plaintiff's complaint alleged medical malpractice and, therefore, was barred because it was both procedurally defective[2] and untimely under the two-year limitation period for malpractice actions, MCL 600.5805(6). Plaintiff argued that she properly raised claims for tort and breach of contract, which were governed by three-year and six-year statutes of limitation, respectively. See MCL 600.5805(10) and MCL 600.5807(8). The trial court agreed with defendants and granted their motion for summary disposition.

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although defendants moved for summary disposition under MCR 2.116(C)(8) and (10), "[i]n determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7)." *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We may review the trial court's decision under the correct subrule. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000). "In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002).

The fundamental question on appeal is whether the trial court erroneously determined that plaintiff's claims were for medical malpractice. Indeed, plaintiff acknowledges that if her claims are for medical malpractice, they are untimely. The essential inquiry is whether plaintiff's claims raise questions of medical judgment beyond the realm of common knowledge and experience. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003).

Medical malpractice has been defined

> as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty, which the law implies from the employment, to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or a similar locality, in the light of the present state of medical science. [*Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 650; 438 NW2d 276 (1989) (citations omitted).]

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[2] It is undisputed that plaintiff did not provide defendants with a notice of intent, MCL 600.2912b, or file an affidavit of merit, MCL 600.2912d, as required for medical malpractice actions.

"(A) complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999) (citations omitted).

In *Bryant*, *supra* at 422, our Supreme Court recently addressed the distinction between ordinary negligence and medical malpractice:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "'within the course of a professional relationship.'" Second, claims of medical malpractice necessarily "raise questions involving medical judgment." Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the (fact-finder)." Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [Citations omitted.]

In this case, plaintiff's claims involve conduct that occurred within the context of a professional relationship, i.e., the conduct of nursing staff who attended to plaintiff following her surgery. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19-22; 651 NW2d 356 (2002). Registered professional nurses "engage in the practice of nursing which scope of practice includes the teaching, direction, and supervision of less skilled personnel in the performance of delegated nursing activities." *Id.* at 19, quoting MCL 333.17201(1)(c). The "practice of nursing" is defined as

> the systematic application of substantial specialized knowledge and skill, derived from the biological, physical, and behavioral sciences, to the care, treatment, counsel, and health teaching of individuals who are experiencing changes in the normal health processes or who require assistance in the maintenance of health and the prevention or management of illness, injury, or disability. [*Cox*, *supra* at 19, quoting MCL 333.17201(1)(a).]

Licensed practical nurses are engaged in a "subfield of the practice of nursing." MCL 333.17208.

> The common-law standard of care applies to malpractice actions against nurses. Therefore, the applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities. Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community. [*Wiley*, *supra* at 492.]

"[A]llegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Dorris*, *supra* at 47. Although plaintiff attempts to distinguish between the "standard of care" that would be required in a malpractice action and the "quality of care" that she claims was breached here, the core of her negligence and breach of warranty claims,[3] is that the hospital staff did not treat her properly. Plaintiff's complaint also includes repeated allegations that the nursing staff failed "to exercise due care and caution" and that the institutional defendants were negligent in the selection of personnel, including allegations of negligent supervision and training, and negligent entrustment of hospital employees. Those questions are not within "the common knowledge and experience of a jury." *Id*. Thus, we conclude that plaintiff's negligence and breach of warranty claims were properly dismissed.

We conclude, however, that plaintiff's claim of intentional infliction of emotional distress was not a malpractice claim. Intentional infliction of emotional distress has occurred when a defendant intentionally or recklessly engages in extreme and outrageous conduct that causes the plaintiff to suffer severe emotional distress. *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). Plaintiff contends, inter alia, that after the nurses were extremely rude to her and commented that someone could inject a substance into plaintiff's IV tube and kill her, the nurses intentionally injected her with a substance that made her sick, and then deliberately ignored her repeated calls for help. In these circumstances, the issue for the jury is not whether the nurses' administration of care was negligent, but whether the nurses deliberately engaged in

extreme and outrageous conduct intended to inflict emotional distress. We conclude that plaintiff established a genuine issue in this regard, separate and apart from any claim of malpractice.[4]

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[3] While plaintiff bases her breach of warranty claim on the "consent for treatment" form that she signed in the hospital before undergoing her operation, authorizations for treatment "do not constitute . .. . written agreement[s] to perform a specific act." *Powers v Peoples Community Hosp Authority*, 183 Mich App 550, 554; 455 NW2d 371 (1990).

[4] We recognize that plaintiff's intentional infliction of emotional distress count may be technically deficient in that plaintiff did not expressly incorporate the factual allegations of her complaint, and did not use the precise language of the elements of the claim. However, plaintiff's Count I is clearly labeled as a claim for intentional infliction of emotional distress, and the factual allegations in the complaint are sufficient to support this claim. The circuit court did not dismiss the claim on this basis, and if this had been the dispositive issue, plaintiff would have had a right to amend the allegations within the complaint's emotional distress count. MCR 2.116(I)(5) (providing that before a claim may be summarily dismissed pursuant to "subrule[s] (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided in MCR 2.118, unless the evidence then before the court shows that amendment would not be justified").

Affirmed in part and reversed in part.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White